

No. 77-905

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

MARY COX, ETC., PETITIONER

v.

ADMINISTRATOR OF THE VETERANS ADMINISTRATION
and UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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1. Petitioner brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, seeking damages for the death of her brother. Her complaint alleged that a clerk in a Veterans Administration hospital had negligently failed to readmit her brother after he had left the hospital against medical advice. This failure to readmit him, she alleged, resulted in his committing suicide (Pet App. 2A).

2. The dispute at trial centered on whether petitioner sought to have her brother readmitted to the hospital on September 20, 1972. Petitioner testified that a hospital clerk had refused to admit her brother at that time or even let him see a doctor. Hospital records, however,

reflected no visit by petitioner and her brother on that day, and the evidence showed that it would have been contrary to the hospital's routine procedures for a clerk to have made the decision whether to admit a patient (Pet. App. 6A-7A). On the basis of petitioner's demeanor and the other evidence in the case, the district court rejected petitioner's testimony about the alleged September 20 visit. In an opinion read from the bench, the district court stated (Pet. App. 7A-8A):

In order to credit [petitioner's] testimony, the Court would have to believe that on this occasion the staff of the Veterans Administration Hospital failed to follow every step of the prescribed procedure. Based upon the demeanor of witnesses and all relevant evidence, the Court finds that [petitioner] has failed to sustain her burden of proof that the decedent Cox, accompanied by her, sought admission to the Veterans Administration Hospital in New York City on September 20, 1972. In fact, regardless of who has the burden of proof on this issue, the Court finds upon all the evidence that [petitioner] and the decedent did not seek admission to the hospital on that day.

The court of appeals properly affirmed the district court's judgment, because its findings of fact are not clearly erroneous. See Fed. R. Civ. P. 52(a). In any event, the district court's resolution of a question of credibility does not present an issue appropriate for this Court's review.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.